

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Copies to:
- Derek
- Tim Tebb
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for response

December 15, 2006

Jay Manning, Director
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98505-7600

Fax 360-407-6989

Dear Mr. Manning,

The Yakama Nation submits the following comments and questions regarding the proposed Voluntary Regional Agreement Between The Columbia-Snake River Irrigators Association (CSRIA) And The Washington State Department of Ecology (Ecology). Our concern is for the health of the Columbia River and the ten thousand year-old Tribal economy and culture that depend on the river's salmon and other aquatic resources. These resources and the Tribal economy have suffered damages from each previous attempt to develop non-Indian economies by damming and diverting the river and its tributaries. We have been working arduously to restore the productivity of the Columbia River system for many years.

The consultation "window" on the VRA was timed by Ecology to run concurrently with statutory deadlines for commenting on the Draft Programmatic Environmental Impact Statement and the Supply and demand inventory. This has placed an unacceptable burden on our resources.

Some of our concerns regarding VRA's have been addressed in our comments on the Draft PEIS, which we incorporate herein by reference.

We posed a number of questions to Ecology at the March 15th meeting with Ecology in the Yakama Tribal Council Chambers. Those questions and Ecology's responses that were presented at the April 5th, 2006 meeting between Ecology and Yakama Nation staffs are incorporated herein by reference. You have previously stated in answer to our questions that the proposed VRA is only a "form of contract" between Ecology and its identified constituents. As such, we are not parties to that and not bound thereto. We fully reserve all rights to further comment and to pursue all remedies available in the future to challenge any violation by the State of applicable laws and Treaties arising from improper action thereunder.

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DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

We reject and dispute the State's policy statement that "no negative impact on flows in July and August...is adequate for purposes of mitigating instream flow impacts resulting from any appropriations for out-of-stream use made under a voluntary regional agreement". We will expect full disclosure of all impacts to flow and water budget for all months of the year when Ecology makes permit decisions. We support the statements of the federal panelists at the CRPAG who stated that any action that made it less likely that BIOP target flows would be met would be problematic.

The Yakama Nation made it clear to Ecology during the last administration that we are already working to fix the damage that previous developments have done to the Columbia River. We are working to repair the tributaries and are not interested in selling the Columbia River to pay for it.

The State's troublesome and unworkable policy choice in limiting consultation to the VRA (rather than the subsequent permit decisions) leads down a blind alley (note: the decision to eliminate the Tribal role in consultation on individual Columbia River permit decisions was made without the Yakama Nation's consent in a legislative process that systematically excluded Tribal participation). The VRA as proposed is vague. Permits are specific with regard to location and timing of impacts. It is impossible to adequately comment at this time on the VRA, which is a general statement of aspirational goals of the State and the signatories covering an undefined geographic region, unnamed and unenumerated participants, and undocumented proposals that have yet to be submitted. There is no indication in the proposed VRA from where water will be diverted, what will be the places or place of use, how much will be consumptively used, nor where the return flows would return. The proposed VRA merely promises to provide money and somehow no impact flows in July and August. There is, in short, nothing to consult on. Given the impossibility of reaching closure during the consultation phase, we must fully reserve all avenues legally available to us to protect our rights as the State makes decisions based on this VRA.

We require further information on this new administrative process. Please describe for us the process of VRA approval and subsequent permit decisions. The Ecology web page says permits will issue "only when it has been demonstrated that no reduction in stream flows will result in the months of July and August". What is the process by which this determination will be made? Does Ecology assume responsibility to ensure that the mitigation water is in place in perpetuity? Does Ecology intend to condition permits under a VRA such that use under the permits will be curtailed if the mitigation water is not present in the river?

Ecology's response to a question posed on March 15th, 2006 by the Yakama Nation stated that "Ecology believes it is most likely that the "July and August" mitigation standard will result in no reduction in stream flows in the mainstem that would conflict with BiOp flows objectives of the Columbia River during the entire season of agricultural use." Does Ecology still believe this? If so, how do you propose to get there? What are the facts upon which you base your conclusions? It is not sufficient under applicable state and federal law that Ecology could allow anyone to use water if it is only "most likely",

but not assured, that the July-August proposal will not conflict with the BiOp flow objectives. The State's proposal fails to protect the fish runs of the Columbia River and instead, subjects them to unacceptable risk. The State's goal appears to be to justify issuing more permits while ignoring its duties to protect and restore fish runs.

CSRIA has asked Ecology to issue water rights to KID under the VRA on July 1st of 2007. Does Ecology intend to comply? How can the requisite steps called for in the VRA and the obligation to ensure replacement water is in the river be accomplished in this time? Is KID the first in line? If not, how will Ecology deal with any senior applications?

Ecology's response to a question posed by the Yakama Nation stated that "Ecology believes it is most likely that the "July and August" mitigation standard will result in no reduction in stream flows in the mainstem that would conflict with BiOp flows objectives of the Columbia River during the entire season of agricultural use." Does Ecology still believe this? If so, how do you propose to get there?

The Kennewick Irrigation District proposal we have seen was 57 cubic feet per second short of being water budget neutral. This is not acceptable under the law. Does Ecology intend to agree to this even though it is in violation of state law? Where will the 57 cfs KID shortage be made up? Will the responsibility to balance the water budget fall upon CSRIA or the State?

Comments on Draft VRA text

In addition to the above comments the Yakama Nation has the following specific comments.

The Preamble mentions the Snake River, but does not correctly state the State's mitigation standard for that river.

Section B, first bullet: What does the term "affected rights" refer to?

Section B, final bullet: What is the point of this section. Is Ecology agreeing to try and meet the requirements of 90.90 RCW or agreeing to do it? Ecology's duties under applicable federal and state law is not met by it only making a "...good faith effort to provide mitigation water..." Ecology has to right to issue permits or otherwise authorize the use of water if it will impair other parties' rights including but not limited to water rights.

What is to stop a CSRIA member from avoiding responsibility under Section C, third and fourth bullets by obtaining new water under a different corporate name.

We are concerned about the lack of specificity regarding the geographic scope and membership of CSRIA. What is the region to which this regional agreement would

apply? Where would the water come from to ensure water budget neutrality? Tributary or mainstem? Which tributaries? Does Ecology believe that anyone anywhere in the Columbia River watershed can join CSRIA in order to take advantage of the VRA? Can they do so after the VRA is signed? Can people back existing pending applications into the VRA after it is signed? If so, explain how consultation on the VRA can anticipate adverse impacts on our interests that will arise on a case-by-case basis.

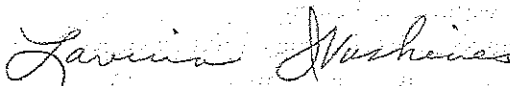
The VRA continues to support mitigation by CSRIA members of \$10 per acre-foot of water as mitigation in the first bullet of Section C. However, we have previously submitted a draft economic report as part of the Yakama Nation's comments on the Departments Inventory Report to the Legislature (Economic Analysis of the Columbia River Basin Water Mitigation Report, Sep. 28, 2006, Resources Dimensions LLP), which is incorporated herein by reference. That draft report refutes Ecology's assumptions that the \$10 per acre-foot is sufficient to obtain replacement water even assuming that such replacement water would be available, an assumption we do not concede. The \$10 per acre-foot has substantial uncertainties and risks that would make the proposed mitigation unacceptable in violation of state and federal law unless the State takes measures to augment the \$10 in order to provide full mitigation.

There is more gray area in the CSRIA VRA than we are comfortable with. Ecology should go through the VRA and explicitly define all operative terms.

We look forward to your responses to these inquiries. Respectful Government-to-Government relations call for much greater information sharing than is mandated by the VRA consultation section of the Columbia River bill. We hope that, as a neighboring sovereign, the State will see fit to continue consulting with the Yakama Nation beyond the meager requirements of the bill. We believe that the State consulting with the Yakama Nation on future administrative actions steps and decisions before they are made may prevent some undesirable outcomes for both of our governments.

Please contact Philip Rigdon at 509-865-5121 if you have any questions on this matter.

Sincerely,



Lavina Washines, Chairwoman
Yakama Tribal Council